

SOUTH DAKOTA OPEN MEETINGS COMMISSION

MINUTES OF MEETING

December 16, 2015

TELEPHONIC HEARING

Members participating: Emily Sovell, Sully County State's Attorney (Chair); John Steele, Aurora County State's Attorney; Kevin Krull, Meade County State's Attorney; Mark Reedstrom, Grant County State's Attorney; and Lisa Rothschadl, Bon Homme County State's Attorney. Steve Blair and Jenna McFarlane, Office of the Attorney General, assisted the Commission.

Chairwoman Emily Sovell called the meeting to order at 1:00 p.m. Mr. Reedstrom moved to approve the proposed agenda; Mr. Steele seconded. A roll call vote was held with Mr. Steele, Mr. Krull, Mr. Reedstrom, Ms. Rothschadl and Chair Sovell all voting aye.

The following is a summary (not verbatim) of the matters discussed.

May 5, 2015 minutes.

Mr. Krull moved to approve the draft minutes of the May 5, 2015 meeting. Ms. Rothschadl seconded. A roll call vote was held with Mr. Steele, Mr. Krull, Mr. Reedstrom, Ms. Rothschadl and Chair Sovell all voting aye.

In the Matter of Open Meeting Complaint 15-01, Mitchell City Council.

Attorney Jon Arneson appeared on behalf of Complainant Evan Hendershot. Mr. Hendershot and Managing Editor Luke Hagen of The Daily Republic also appeared.

Attorney Karl Koch appeared on behalf of Mitchell City Council. Mayor Jerry Toomey and City Administrator Stephanie Ellwein also appeared.

The issue before the Commission was whether the executive session of the September 21, 2015, meeting of the Mitchell City Council was proper. The purpose of the executive session according to the City Council was to discuss the qualifications, competence, performance, character or fitness of any public officer, employee or prospective public officer or employee as allowed by SDCL 1-25-2(1).

Mr. Arneson informed the Commission that on September 10 the Corn Palace Director, an officer of the City, resigned. The Mayor, who appoints that position, accepted the resignation. A few days later the individual who had

resigned submitted a letter asking that his resignation be rescinded. The Mayor was made aware that numerous citizens planned to attend the September 21, Council meeting to express concern about the resignation. The executive session was used to allow members of the public to express an opinion on the matter to the Council. One by one the members of the public were brought into executive session before the Council and allowed to express their opinion.

Mr. Arneson argued this was not an executive session for the purpose of discussing a prospective public officer or employee. According to Mr. Arneson, the Mayor had already determined that the resignation would not be rescinded. Further, the City had already advertised for the vacant position.

Mr. Arneson also asserted that there was no evidence in the record of the meeting that would indicate a "discussion" had taken place. Mr. Arneson stated that the members of the public were allowed to address the Council one-by-one, but the Council members merely listened and did not respond to any comments from a member of the public. Mr. Arneson did not believe this met the normal definition of "discussion."

Mr. Arneson concluded that the executive session was improper in that it did not involve a discussion and it did not involve a perspective employee.

Mr. Koch, responding for the City Council, stated that he believed 80 or so people came to the meeting for the purpose of altering a decision that the Mayor had made regarding the resignation of the Corn Palace Director.

Mr. Koch noted that nobody was claiming the City Council said nothing during the executive session. Mr. Koch went on to assert that "discussion" is a very broad term.

Mr. Koch also asserted that no new person had been hired for the Corn Palace Director position, and at the time of the hearing the position remained open.

Finally, Mr. Koch stated the City would have loved to share with the public the details that led to the resignation, but the City believed that would have been a violation of the privacy of the individual and would have exposed the City to a lawsuit. It was suggested that the public input on the resignation be moved into an executive session for that personnel purpose and to defuse the situation.

At this time Mayor Toomey addressed the Commission and discussed legal advice he received that recommended the executive session be held to discuss the purported personnel matter.

Mr. Reedstrom at this point asked Mr. Arneson to restate the argument that the individual who had resigned was not a prospective public officer or employee.

Mr. Arneson cited to the dictionary definition of “prospective,” and stated he felt it was pretty clear that the individual was not likely to be hired for any position in the City of Mitchell at that point. Mr. Arneson noted that the City had begun advertising for the position shortly before the Council meeting at issue, but that the purpose of the Council meeting was to allow the public to express their grievances or support of the resigned individual.

Mr. Arneson also disagreed with Mr. Koch’s assertion that the Council did not sit silently as they were addressed by members of the public.

Mr. Reedstrom questioned whether this was a situation where the individual, who resigned, could still be considered a prospective public officer or employee. Mr. Arneson stated the Mayor’s mind was already made up that the individual was not a prospective employee.

Mr. Reedstrom noted that in the minds of the people that came before the City Council to support the former Director he was a prospective employee. Mr. Arneson stated just because somebody wants it to be and supports the person, does not make them a prospective employee especially when the decision makers have made up their minds.

The Commission moved into deliberations at this point in the proceeding.

Chair Sovell stated that in her opinion there was a chance this individual could have been reconsidered for the position and the Legislature has given the ability to the public bodies to discuss those matters in executive session.

Mr. Steele followed up stating he felt Mr. Arneson was correct when he observed that executive session language in the statute is not mandatory. Steele did not see any reason the matters discussed in the executive session could not have been held in public session, and he stated that it would have been better policy to hold the discussion in public. Steele felt that as long as the individual had interest in withdrawing his resignation that he was still a prospective employee. Steele stated that he felt Mr. Arneson was taking too narrow of a view of what constituted a “discussion.” Steele concluded that he did not believe the City was prohibited by law from going into executive session for the stated purpose.

Ms. Rothschadl agreed with Mr. Steele that under those circumstances the individual was a prospective employee. Rothschadl also agreed it would have been better for the City to have held the discussion in public, she did not believe the statute required the City to do so.

Mr. Reedstrom concurred with Commissioners Steele and Rothschadl and stated the he agreed that the discussion could have been in public session, but that it did not fall outside the exception that allowed the City to enter executive session.

Mr. Krull concurred with the others and noted that the complainant was taking too narrow of a view of the term discussion and whether the individual was a prospective employee.

Chair Sovell stated that in her opinion SDCL 1-25-2 clearly states that the meeting may be held in executive session.

Ms. Rothschadl moved to find no violation against the Mitchell City Council. Mr. Steele seconded. Roll call vote was made with Mr. Steele, Mr. Krull, Mr. Reedstrom, Ms. Rothschadl and Chair Sovell all voting aye.

Steve Blair was directed to draft the findings and conclusions for the board.

At this point Luke Hagen, Mitchell Daily Republic, addressed the Commission to state his disagreement with the decision.

In the Matter of Open Meeting Complaint 15-02, Sully County Planning and Zoning Commission, Sully County Commission, and the Sully County Planning and Zoning Commission sitting as the Board of Adjustment.

Chair Sovell due to her involvement with Sully County excused herself from participating in the hearing. John Steele proceeded as Chairman for the hearing.

Attorney Adam Altman appeared as the Complainant. Attorney Jack Hieb appeared on behalf of the Sully County entities.

Mr. Altman stated there were four separate open meeting violations listed in the complaint. Essentially the complaint stated that notices of these four public meetings were not given on the website sullycounty.net.

Mr. Altman noted that the County entities have proposed two separate arguments in response to the complaint. First, that because each county entity is treated as a separate public body they therefore would be required to maintain their own separate website if the provision of SDCL 1-25-1.1 were to apply. Second, that a public body can disclaim the website requirement of SDCL 1-25-1.1 by putting a disclaimer notice on a website informing the public the website is not regularly updated.

Mr. Altman stated in reference to the first argument that to absolve the Sully County Planning and Zoning Commission from a violation because it is a separate public entity and because it does not maintain a website separate from the County's would not be in furtherance of open meetings in South Dakota.

Mr. Altman, in reference to the second argument stated that there is no requirement in SDCL 1-25-1.1 that an entity “officially” adopt a website.

Mr. Hieb stated that the first time the website issue was brought to the County’s attention was on February 26, 2015. According to Mr. Hieb the minutes of the meeting reflect that the website was not used by the County and that none of the County Commissioners ever recalled authorizing or approving the website. The website was apparently created by an employee of the County, at that employee’s expense. After the above referenced meeting it was determined that a disclaimer should be added to the website to make it clear that the website was not the official website of Sully County.

Mr. Hieb argued that no one has come forward to claim that they did not have adequate notice of the ethanol plant issue underlying the open meetings complaint.

Mr. Hieb stated that there is no evidence that Sully County owns sullycounty.net. It was reiterated that the website was created by a county employee that to this day controls the website.

Mr. Altman in rebuttal stated that everything on the website gave the impression it is Sully County’s website. Mr. Altman stated that throughout the website there are copies of agendas, minutes and a privacy policy that specifically claimed everything on the site was the property and under control and protected by Sully County. Mr. Altman continued with stating if Sully County were interested in making sure that sullycounty.net were not mistaken for its website then it is under obligation to do some sort of cease and desist.

Mr. Reedstrom inquired of Mr. Hieb if Sully County was in the past using the website for purposes of publication of notices of meetings, and if so does that not impute knowledge that Sully County believed that it was their website for that purpose. Mr. Hieb stated in order for a county to own the website that action has to come from the County Commission and the fact that an employee set up a website and makes the auditor aware of it and helps the auditor post agendas does not make it the county’s website.

Mr. Reedstrom stated it was his understanding that the website was hosted by another company called Factor 360. Mr. Reedstrom indicated that he had accessed the website himself to look at some minutes of Sully County Board of Commissioner’s meetings and saw quarterly expenditures made to Factor 360 for \$150. Mr. Hieb stated that he was unaware of these expenditures, that they may have happened for a period of time, but by the time of the complaint the Sully County Commission had not been using the website and the Commissioners did not know they had a website.

Mr. Krull inquired if Mr. Hieb knew when the disclaimer was first posted on the website. Mr. Hieb stated it was some time after the February 26 meeting and before the March 24 meeting. Mr. Altman agreed with those dates, and stated that the fact that the disclaimer was added to the website indicated the County had some control over the website.

Mr. Steele inquired if the County Auditor was aware the website existed. Mr. Hieb indicated yes he believed that to be true. Mr. Steele asked Mr. Reedstrom what minutes he had looked at on the website that indicated payment was

made to Factor 360 as a webhost. Mr. Reedstrom responded that he looked at minutes dated May 7, 2013, August 6, 2013, and February 4, 2014. In the May 7, 2013 minutes, it shows a payment to Factor 360 for \$150. Mr. Steele asked if Mr. Hieb had a response. Mr. Hieb stated again that he did not go back and review the minutes that were posted on the website, but that he only looked at the results of the investigation done in response to the complaint. Mr. Hieb stated that everybody or most people knew of the existence of the website, but that it had quit being updated as some point.

At this point the Commission went into deliberations.

Mr. Reedstrom agreed with Mr. Altman that the statute says nothing about a website having to be an "official" website adopted by the public body. Mr. Reedstrom believed this was Sully County's website, that Sully County had in the past paid for it be hosted, and that because of that, there was a violation of SDCL 1-25-1.1.

Mr. Krull agreed with Mr. Reedstrom's analysis with the exception that once the disclaimer was posted on the website, that protected the County and therefore there was a violation for the February 2 and February 26 meetings, but the March 24 and July 14 meetings did not violate the open meetings laws.

Ms. Rothschadl noted the website was used regularly in 2013 or 2014, and that some portions of Sully County government were still using the website. Ms. Rothschadl stated she believed it was a violation of the statute if the County is not using it to publish notice of their meetings. Ms. Rothschadl also recognized that this was perhaps a lesson for all counties to ensure that any webpage that exists is monitored and administered properly.

Mr. Steele concurred that the website at issue is the County's website for purposes of considering the open meetings complaint. It was recognized that many or all of the County's employees knew the website existed, it had been used by County officers to post agendas and minutes, and it appeared that the County was paying for the website to be hosted. Mr. Steele noted that the statute does not require that the County officially designate a website. Mr. Steele stated he believed the County had a responsibility to either ensure that the website was maintained or take action to have the website substantially altered or taken down. Mr. Steele concurred with Mr. Reedstrom that a violation had occurred on all four counts alleged in the complaint. Mr. Reedstrom motioned to find a violation on all four counts alleged by Mr. Altman. Ms. Rothschadl seconded. A roll call was made and Mr. Reedstrom, Ms. Rothschadl and Mr. Steele voted aye. Mr. Krull voted nay. Chair Sovell abstained.

Steve Blair was directed to draft the findings and conclusions for the board.

In the Matter of Open Meeting Complaint 14-05, Imlay Township Board of Supervisors.

The Commission considered proposed Findings of Fact and Conclusions of Law drafted in regards to this matter. Mr. Reedstrom made a motion to approve the Findings of Fact and Conclusions of Law as drafted which was seconded by

Steele. Mr. Steele, Mr. Krull, Mr. Reedstrom, Ms. Rothschadl and Chair Sovell all voted aye.

Election of OMC Chairman.

Mr. Steele nominated Sovell. Mr. Reedstrom seconded. A roll call was conducted and with Mr. Steele, Mr. Krull, Mr. Reedstrom, Ms. Rothschadl and Chair Sovell all voting aye. Chair Sovell will serve a second term starting January 1, 2016.

Scheduling.

After discussion the OMC agreed to hold off on scheduling a meeting.

Adjournment.

A motion to adjourn was made by Krull, seconded by Reedstrom, at approximately 3:15 p.m. Mr. Steele, Mr. Krull, Mr. Reedstrom, Ms. Rothschadl and Chair Sovell all voted aye and the Commission adjourned.

Approved on _____, 2016.

Emily Sovell, Chairwoman
On behalf of the Open Meeting Commission